No. 88-465

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HURON VALLEY HOSPITAL, INC., and
MARTIN L. TREPEL, D.O.,

Petitioners,

v.

CITY OF PONTIAC, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Grady Avant, Jr.
(Counsel of Record)
Jerry L. Johnson
DICKINSON, WRIGHT, MOON, VAN DUSEN & FREEMAN
800 First National Building
Detroit, Michigan 48226
(313) 223-3500
Attorneys for Greater Detroit Area Health Council, Inc. and North Oakland County Planning Steering Committee

Robert A. Maxwell
(Counsel of Record)
David A. Hardesty
MAXWELL, SMITH, HANSON & MULVOY
300 E. Long Lake Rd. Ste. 300
Bloomfield Hills, MI 48013
(313) 647-1500
Attorneys for Sisters of Mercy Health Corporation

Anthony A. Derezinski
MERCY HEALTH SERVICES
28700 Eleven Mile Road
Farmington Hills, Michigan 48081
(313) 478-6313
Of Counsel for Sisters of Mercy Health Corporation

Larry J. Saylor
(Counsel of Record)
MILLER, CANFIELD, PADDOCK AND STONE
2500 Comerica Building
Detroit, Michigan 48226
(313) 963-6420
Attorneys for City of Pontiac and City of Pontiac Hospital Building Authority

Timothy M. Guerriero
(Counsel of Record)
Bruce G. Davis
RILEY AND ROUMELL
7th Floor Ford Building
Detroit, Michigan 48226
(313) 962-8255
Attorneys for Comprehensive Health Planning Council of Southeastern Michigan, Terence E. Carroll and Paul Massaron

INLAND ARONSSON PRINTING, DETROIT, MICHIGAN

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Was the Sixth Circuit correct in affirming the District Court's summary judgment when, after review of the voluminous record compiled after exhaustive discovery, the District Court determined that there was no genuine issue of material fact as to the existence of a conspiracy where (a) there was no direct evidence of the alleged conspiracy; and (b) the circumstantial evidence was ambiguous and as consistent with permissible conduct as with illegal conspiracy?
2. Was the Sixth Circuit correct in affirming the District Court's summary judgment, made after review of the voluminous record compiled after exhaustive discovery, where Petitioners failed to come forward with evidence sufficient to create a genuine issue of fact as to whether (a) Respondents' activities were other than genuine efforts to influence official decision making; or (b) Petitioners were barred from meaningful access to the regulatory process?

PARTIES TO THE PROCEEDING

The Respondents to this action are the City of Pontiac, City of Pontiac Hospital Building Authority, Sisters of Mercy Health Corporation, Comprehensive Health Planning Council of Southeastern Michigan, North Oakland County Planning Steering Committee, Greater Detroit Area Health Council, Inc., Paul Massaron, and Terence E. Carroll (hereinafter "Respondents").[1]

Additional defendants below included Bailus Walker, Jr., Maurice S. Reizen, M.D., Herman A. Ziel, M.D., and Richard Reihmer, all former employees of the Michigan Department of Public Health (the "MDPH Officials"). The MDPH Officials were not parties to the summary judgment presently under review. The impact of the summary judgment on the MDPH Officials is described in the Sixth Circuit opinion. *Huron Valley Hospital, Inc.* v. *City of Pontiac*, 849 F.2d 262, 263 (6th Cir. 1988); Petition at 2a-3a.

[1] Pursuant to Supreme Court Rule 28.1, Respondents state that except as follows, they have no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates. Sisters of Mercy Health Corporation is a wholly-owned subsidiary of Mercy Health Services, a Michigan nonprofit corporation.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In 1975, petitioner Martin Trepel, D.O., concluded that a scheme to establish and construct a hospital in western Oakland County, Michigan, would be, in his words, an "attractive business opportunity." Trepel recruited a board of trustees for this venture, whose first official action was to enter into a consulting services agreement with West Oakland Hospital Services Corporation, a for-profit corporation wholly owned by Trepel. Under the agreement, Trepel would be reimbursed for his expenses and compensated for his time in attempting to obtain regulatory approval and financing for the project. In addition, the agreement gave Trepel the exclusive, noncancellable right to provide or subcontract for all ancillary services (such as radiology, laboratory, anesthesiology, physical therapy, and even television rental) for the proposed hospital.

Trepel and his Board were aware that the then-current Michigan State Plan for Hospital and Medical Facilities Construction indicated that the western Oakland County area was

already over-bedded, and that it therefore would be difficult to meet the statutory burden of demonstrating need for a new hospital. Petitioners now claim that the difficulties they admittedly anticipated in obtaining regulatory approval were the result not of the regular and proper functioning of the regulatory process, but of an imagined conspiracy among Respondents and officials of the Michigan Department of Public Health (MDPH).

1. The Respondents

The Comprehensive Health Planning Council of Southeastern Michigan (CHPC-SEM) was the designated health systems agency (HSA) for southeastern Michigan under the federal and state health planning legislation then in effect.[2] CHPC-SEM was required by law to evaluate certificate of need (CON) applications filed by institutions within its health service area and make non-binding recommendations to MDPH.

CHPC-SEM was a private non-profit corporation[3] composed of citizen volunteers who represented consumers and providers of health care. The volunteers were chosen, pursuant to federal requirements, based upon their geographic distribution within the health service area; their affiliations with other local political entities such as city councils, county commissions, mental health boards and the like; and their affiliations with various interest groups such as labor organizations, insurers, physicians, hospitals and other segments of the community with a direct or indirect interest in the distribution of

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[2] The federal and state legislation is described in the District Court's opinion, *Huron Valley Hospital, Inc. v. City of Pontiac*, 650 F. Supp. 1325, 1335-36 (E.D. Mich. 1987), *aff'd*, 849 F.2d 262 (6th Cir. 1988); Petition at 22a-24a.

[3] The federal legislation pursuant to which CHPC-SEM acted and was funded expired on September 30, 1986. Pub. L. No. 99-660, Title VII, § 707(a), 100 Stat. 3799. CHPC-SEM thereafter ceased its regional health planning activities and was dissolved as a Michigan non-profit corporation on May 5, 1988.

health care services.

Terence E. Carroll was the Executive Director of CHPC-SEM. Paul Massaron was one of 24 volunteer members of the CHPC-SEM Executive Committee and one of 27 members of its Plan Implementation Committee. He was appointed in his capacity as an employee of the United Auto Workers (UAW) Region 1B, which encompassed the Pontiac, Michigan area.

The Greater Detroit Area Health Council (GDAHC) is and has been since 1944 a non-profit community service organization whose primary purpose is educational. A majority of its members were representatives of civic, business and labor organizations, and third-party payors such as Blue Cross and insurance companies.

Through October 31, 1975, GDAHC reviewed CON applications under contract with CHPC-SEM. GDAHC's Planning Program specifically set out its intention to work closely with CHPC-SEM in developing its procedures and standards, and to educate community organizations about local hospitals' programs.

The North Oakland County Planning Steering Committee (NOCPSC), formed in 1969, was one of several Sub-Area Hospital Planning Committees organized by GDAHC throughout southeastern Michigan. Its members were the four hospitals located in the North Oakland County Sub-Area. As noted by the District Court, NOCPSC, was a direct outgrowth of the Partnership for Health Amendments of 1967, which mandated that state plans

> provide for assisting each health care facility in the State to develop a program for capital expenditures for replacement, modernization and expansion . . . without duplication and otherwise in the most efficient and economical manner . . . .

650 F. Supp. at 1330; Petition at 10a. These planning committees worked to minimize duplication among providers, and to provide forums for communication among hospitals on their plans and program developments.

The City of Pontiac and the City of Pontiac Hospital Building Authority are Michigan municipal corporations which own and operate Pontiac General Hospital in Pontiac, Michigan. Sisters of Mercy Health Corporation is a private non-profit corporation which owns and operates St. Joseph Mercy Hospital in Pontiac, Michigan.

2. The Regulatory Process

The District Court correctly described and summarized the regulatory process and the sequence of events leading up to MDPH's denial of Petitioners' CON application:

> As explained in this Court's prior opinion, 585 F. Supp. 1159 (1984), in order for plaintiff to build its hospital, it had to obtain a certificate of need (CON) from the State of Michigan, and capital expenditure approval from the Department of Health and Human Services (HHS) under Section 1122 of the Social Security Act, 42 U.S.C. § 1320a-1. The Section 1122 program, along with the National Health Planning and Resources Development Act of 1974, 42 U.S.C. § 300k *et seq.*, are major federal programs established to cut down unnecessary medical costs. Under this legislation, states, including Michigan, have established CON programs to ensure that new hospital construction or expansion of existing facilities are not undertaken in areas where they are not needed. The Michigan Department of Public Health (MDPH) is the state agency that administers both the CON program and the Section 1122 program, pursuant to contract with HHS. Under both the Federal and state schemes, MDPH is to obtain the nonbinding recommendation of the local health services agency on an application for CON and Section 1122 approval. In the case at bar, CHPC-SEM was the local health services agency.
>
> The following is the timetable for plaintiff's procurement of Certificate of Need (CON) and Section 1122 approval.
>
> October 1976: Joint CON and Section 1122 application filed with CHPC-SEM and MDPH

January 1977:	First amended application submitted pursuant to CHPC-SEM request for 5 year financial retrospective
February 1977:	Second amended applications submitted pursuant to CHPC-SEM request for additional materials
February 10, 1977:	CHPC-SEM considers plaintiff's application complete
February 14-17, 1977:	CHPC-SEM staff completes "staff analysis" of plaintiff's application and submits it to plaintiff and the CHPC-SEM Plan Implementation Committee (PIC). This analysis contains no recommendation. However, it addresses seven categories of CHPC-SEM Board adopted criteria and concludes with respect to five categories that "this project is not consistent with CHPC-SEM Board-adopted criteria."
February 23, 1977:	CHPC-SEM PIC, chaired by Massaron, with 20 of 27 members present, reviews plaintiff's application. PIC votes 14-1, Massaron abstaining, to recommend disapproval.
March 10, 1977:	Massaron presents PIC recommendation to CHPC-SEM Executive committee. Executive Committee, with 17 of 24 members present, votes 9-1 (with Massaron abstaining) to recommend disapproval to MDPH. This recommendation is legally non-binding on MDPH.

March 14-July 5, 1977: Contacts between plaintiff and MDPH, and between MDPH and others. MDPH solicits additional information from plaintiff. MDPH denies plaintiff's application.

650 F. Supp. at 1328-29; Petition at 6a-8a.

Petitioners appealed the denial of their application to the Michigan State Health Facilities Commission (MSHFC). After 18 days of hearings, the hearing officer issued a 120-page report of findings and recommendations. Among his conclusions were that (1) the application was "clearly inconsistent" with the State Plan, and (2) Petitioners had failed to demonstrate need for the hospital. Petitioners filed objections to the hearing officer's report. In a 142-page opinion and order, the full Commission affirmed MDPH's denial of Petitioners' application, concluding, *inter alia*, that:

> Huron Valley Hospital has not met the statutory requirement of establishing that a need exists . . . .
>
> [There was] no proof that the proposed population to be served is receiving inadequate medical care at present.
>
> [T]he construction of the proposed facility would be a further addition at considerable increased cost of patient care to an area previously determined to be overbedded by 146 beds.
>
> [T]he application [is] clearly inconsistent with the State Plan.

Petitioners then appealed to the Michigan circuit court, as allowed by statute. That court ordered MDPH to issue the CON, based on its findings that the criteria employed by MDPH had not been properly promulgated under the Michigan Administrative Procedures Act. The Michigan Court of Appeals upheld this decision, *Huron Valley Hospital, Inc.* v. *MSHFC*, 110 Mich. App. 236, 312 N.W.2d 422 (1981), and the

Michigan Supreme Court denied review. Petitioners received a CON in spite of the fact that there was never a finding that the proposed hospital was needed.

MDPH then recommended capital expenditure approval under Section 1122 in return for an agreement to dismiss MDPH from this suit. Based on that recommendation, which did not include a finding of need for the facility, HHS issued the approval. Because the Section 1122 approval had been issued without any finding of actual need, several of the Respondents filed requests with HHS for reconsideration, as allowed by statute. 42 U.S.C § 1320a-1(f). HHS thereafter vacated its Section 1122 approval. In April 1984, the District Court issued a writ of mandamus directing HHS to grant Petitioners Section 1122 approval. *Huron Valley Hospital, Inc.* v. *City of Pontiac*, 585 F. Supp. 1159 (E.D. Mich. 1984).

After several unsuccessful attempts to obtain construction financing for the hospital, Huron Valley was acquired by Harper Grace Hospitals[4] in October 1984. As part of the acquisition, Harper Grace purchased Trepel's corporation and its only asset, the contract granting Trepel the exclusive brokering rights for ancillary services. Trepel's original assessment of the "business opportunity" proved to be correct: He was paid $7 million for his corporation, plus an additional $2.7 million as reimbursement, with interest, of his expenses. Trepel retained the exclusive right to provide radiological services to the hospital for 15 years, which right he subsequently sold. Trepel also was assigned the right to receive any proceeds of this lawsuit, and to control this litigation.

In March of 1986 Huron Valley Hospital opened for business, despite the lack of any demonstrated need for such a facility. Data compiled by Huron Valley Hospital itself offers eloquent evidence that the hospital was not needed: Its occu-

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[4] Harper Grace Hospitals was the predecessor organization to Health Systems Community Hospitals, Inc. (*see* Petition at ii, n.1).

pancy rate during 1987 was about 32%, and its operations have produced a net loss.

3. Procedural History

The original complaint in this action was filed in November 1978, prior to the final MSHFC decision denying Petitioners' CON application. The defendants moved for dismissal on the pleadings, which the District Court granted in March 1979. *Huron Valley Hospital, Inc.* v. *City of Pontiac,* 466 F. Supp. 1301 (E.D. Mich. 1979). In its opinion, the court based the dismissal on several grounds, including implied partial repeal of the antitrust laws through Congress' enactment of health planning statutes, exemption under the "state action" doctrine of *Parker* v. *Brown,* and immunity under the *Noerr-Pennington* doctrine.

In December 1981, the Sixth Circuit vacated the judgment and remanded the case for issuance of a stay pending the outcome of state administrative and court proceedings. *Huron Valley Hospital, Inc.* v. *City of Pontiac,* 666 F.2d 1029 (6th Cir. 1981). The Sixth Circuit specifically addressed and rejected the District Court's implied repeal rationale, following this Court's decision in *National Gerimedical Hospital & Gerontology Center* v. *Blue Cross of Kansas City,* 452 U.S. 378 (1981). 666 F.2d at 1033-34.

Petitioners filed an amended complaint in November 1983, adding as defendants Crittenton Hospital, Pontiac Osteopathic Hospital, the four MDPH Officials, then-Secretary of HHS Margaret Heckler, and Respondents Carroll, Massaron, and Sisters of Mercy Health Corporation. Shortly thereafter, several defendants moved for judgment on the pleadings, which was denied by the District Court. *Huron Valley Hospital* v. *City of Pontiac,* 612 F. Supp. 654 (E.D. Mich. 1985).[5]

[5] The MDPH Officials appealed from that ruling, and the Sixth Circuit affirmed. *Huron Valley Hospital, Inc.* v. *City of Pontiac,* 792 F.2d 563 (6th Cir.), *cert. denied sub nom., Walker* v. *Huron Valley Hospital, Inc.,* 479 U.S. 885 (1986).

Petitioners thus were granted the opportunity to provide evidence to support the allegations in their complaint.

During discovery in this case, hundreds of thousands of pages of documents were produced by the parties and various witnesses. Interrogatories were served and answered. Sixty-five witnesses were deposed for all or parts of 88 days, with 1323 deposition exhibits marked. In January 1986, the District Court granted Respondents' motion to add Trepel as a named plaintiff.

On December 18, 1986, the District Court issued a 45-page opinion granting Respondents' motion for summary judgment. In that opinion, the court observed:

> With discovery now closed, the record in this case is voluminous, consisting of more than 50 depositions, more than 300 exhibits, and several affidavits. The question now presented is whether a reasonable jury, confronted with this mass of evidence, could find in favor of plaintiff. The dispute focuses on the permissible inferences from the facts set forth below.

650 F. Supp. at 1328; Petition at 6a.

The District Court's grant of summary judgment was based not on the view that a higher degree of proof of conspiracy is required in a health care case, but simply on the determination that the evidence produced in this voluminous record was not sufficient, under this Court's announced standards, to create a jury issue. The District Court's ruling is explicit:

> The evidence upon which plaintiff relies is too ambiguous to permit a jury to find defendants engaged in an antitrust conspiracy rather than in the joint planning activity envisioned in federal and state health care legislation.
>
> It is therefore clear that the extensive evidence developed at deposition and in discovery is not sufficient to justify putting this case to the jury against the defendants who are movants here.

Petitioners appealed the District Court's grant of summary

judgment to the Sixth Circuit.[6] As in their Petition to this Court, Petitioners attempted to characterize the District Court's findings of lack of evidence as improper conclusions of law.

The entire record before the District Court was transmitted for consideration by the Sixth Circuit. This second review resulted in a straightforward per curiam opinion, the substance of which was:

> Our review of the record and of Judge Gilmore's careful 45-page opinion convinces this Court that all possible facts have been entered into this record and that summary judgment with respect to all ten of the named defendants was properly granted.

Huron Valley Hospital, Inc. v. *City of Pontiac*, 849 F.2d 262, 263 (6th Cir. 1988); Petition at 2a.

Petitioners now ask this Court to review yet again the voluminous record in this case, in the hope that this Court will arrive at a *factual* determination contrary to that of the trial and appellate courts.

REASONS FOR DENYING THE PETITION

1. None of the Questions Presented in the Petition Merits Consideration by this Court

In their Petition, Petitioners set forth substantially the same arguments they made to the Sixth Circuit.[7] In essence, Petitioners' contentions are: (1) that the District Court erroneously concluded that a "higher degree of proof" of conspiracy is necessary in health care cases; and (2) that the District Court erroneously failed to apply the "sham" and "co-conspirator"

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[6] The appeal was from the District Court's entry of partial final judgment pursuant to Fed. R. Civ. P. 54(b). The District Court subsequently granted the MDPH Officials' motion for summary judgment. *Huron Valley Hospital, Inc.* v. *City of Pontiac*, 686 F. Supp. 608 (E.D. Mich. 1988). Petitioners' appeal of that judgment is pending before the Sixth Circuit, No. 88-1702.

[7] Compare the Statement of Questions Presented in Petitioners' Brief to the Sixth Circuit, Appendix A hereto, with the Questions Presented in the Petition at i.

exceptions to the *Noerr-Pennington* doctrine. Petitioners have mischaracterized the District Court's legal analysis and, in reality, ask this Court to review the record and determine if the lower courts correctly evaluated the sufficiency of the evidence. This Court has stated that such is not the task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). Petitioners devote nearly half of their Petition to a detailed, and one-sided, recitation of the facts. The issues Petitioners raise turn entirely on the facts of this case and are without significant impact outside the limits of this case.

None of the questions presented in the Petition meets the requirements of Supreme Court Rule 17, governing review on certiorari. The questions presented do not involve a conflict between the decisions of the federal courts of appeal, any important question of federal law, or any conflict with applicable decisions of this Court. Certiorari should therefore be denied.

2. Both the District Court and the Court of Appeals Properly Applied the Summary Judgment Standards Articulated in this Court's Prior Opinions

Petitioners concede that there is no direct evidence of the conspiracy alleged. Both the District Court and the Circuit Court properly concluded that the circumstantial evidence to which Petitioners point (to the extent it exists in the record at all) is legally insufficient to permit a jury to find the conspiracy alleged. In *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323-24 (1986), *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248-52 (1986), and *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 585-88 (1986), this Court emphatically endorsed summary judgment and rejected any suggestion that summary judgment is disfavored in antitrust and other complex cases. In *Celotex*, the Court emphasized the importance of Rule 56 in terminating baseless claims:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole.

477 U.S. at 327.

Conspiracy is an essential element of a claim under 15 U.S.C. § 1. *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). In *Matsushita*, this Court held that the plaintiff must produce evidence that "tends to exclude the possibility" that the defendants acted unilaterally. 475 U.S. at 588, quoted by the District Court, 650 F. Supp. at 1333; Petition at 17a.

As the District Court noted, Petitioners' circumstantial evidence of conspiracy consists principally of numerous contacts between and among the Respondents and the MDPH Officials. The District Court specifically reviewed all of this evidence and determined that it was insufficient to permit a jury to infer the existence of the conspiracy alleged, because there were legitimate nonconspiratorial explanations for these contacts. 650 F. Supp. at 1337-1339; Petition at 24a-28a. In making this determination, the District Court expressly relied on and properly applied the standards articulated by this Court in *Monsanto* and *Matsushita*.

In *Monsanto*, this Court considered a claim that a manufacturer's termination of a price-cutting distributor, after receiving complaints from other distributors, was part of a conspiracy to fix prices. The Court held that evidence of communications between the manufacturer and distributors was not enough to establish a conspiracy, because there were "legitimate reasons" for these communications:

> [T]he fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that distributors are not making independent pricing decisions. A manufacturer and its distributors have legitimate reasons to exchange information about the prices and reception of their products in the market.

465 U.S. at 762.

In *Matsushita*, this Court reaffirmed *Monsanto* and explicitly

rejected the argument Petitioners now advance, that ambiguous evidence is sufficient to defeat summary judgment if the defendants had a plausible motive to conspire:

> We do not imply that, if petitioners had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy. *Id.* at 763-764.

475 U.S. at 597 n.21.

Following *Monsanto* and *Matsushita*, every Court of Appeals that has considered the question has held that conduct for which there is a legitimate alternate explanation does not permit the inference of conspiracy requisite to a Section 1 claim.[8] The District Court applied this well-settled law to the record before it. It properly concluded that federal and state programs mandating both cooperative planning among hospitals and communication concerning such planning with MDPH and CHPC-SEM provided a legitimate alternate explanation for such communications which precluded a jury from finding the alleged conspiracy to deny Huron Valley a CON.

As the District Court recognized, given the regulatory environment, each of the agreements and communications among the Respondents had legitimate, non-conspiratorial explana-

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[8] See, *e.g.*, *Key Financial Planning Corp.* v. *ITT Life Ins. Corp.*, 828 F2d 635 (10th Cir. 1987); *Belfiore* v. *New York Times Co.*, 826 F.2d 177 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1030, 98 L.Ed. 2d 994 (1988); *Culberson* v. *Interstate Electric Co.*, 821 F.2d 1092, *reh'g denied en banc*, 827 F.2d 768 (5th Cir. 1987); *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 822 F.2d 656 (7th Cir.), *cert. denied*, 108 S.Ct. 488, 98 L.Ed. 2d 486 (1987); *Souza* v. *Estate of Bishop*, 821 F.2d 1331 (9th Cir. 1987); *Gibson* v. *Greater Park City Co.*, 818 F.2d 722 (10th Cir. 1987); *T.W. Electric Service, Inc.* v. *PECA*, 809 F.2d 626 (9th Cir. 1987); *O.S.C. Corp.* v. *Apple Computer, Inc.*, 792 F.2d 1464 (9th Cir. 1986); *Great Escape, Inc.* v. *Union City Body Co.*, 791 F.2d 532 (7th Cir. 1986); *Beach* v. *Viking Sewing Machine Co.*, 784 F.2d 746 (6th Cir. 1986). Also see *Wilcox* v. *First Interstate Bank of Oregon, N.A.*, 815 F.2d 522 (9th Cir. 1987) (j.n.o.v.).

tions consistent with their independent interests. The Respondent hospitals could not pursue their individual projects without first demonstrating, to MDPH and CHPC-SEM, participation in cooperative agreements to avoid duplication of services. 650 F. Supp. at 1338; Petition at 26a-27a.

As the District Court concluded:

> [T]here is no significant evidence that the joint planning activity undertaken was other than pursuant to the statutory scheme calling for such cooperation in the health care field. Allowing plaintiff to go to trial without more than this circumstantial evidence of legitimate cooperation among defendants may impede the operation of legislation designed to promote efficient and economical provision of health care services. As in [*Matsushita*], this case calls for hesitancy in allowing a potentially mistaken inference of conspiracy . . . .
>
> * * *
>
> It is therefore clear that the extensive evidence developed at deposition and in discovery is not sufficient to justify putting this case to the jury against the defendants who are movants here. These defendants' joint activity does not create a factual antitrust jury issue because the activity was cooperation equally suggestive of compliance with legislation encouraging joint planning in the health field as with antitrust conspiracy. Nor can these defendants be held liable for MDPH's procedural improprieties evidenced in the processing of plaintiff's CON application.

650 F. Supp. at 1338-39, Petition at 26a, 28a.

Recognizing that this Court will not review the rulings of the lower courts on the sufficiency of the evidence, Petitioners attempt to mischaracterize those opinions as applying "implied repeal" — a doctrine neither the District Court nor the Court of Appeals relies upon or even mentions in the opinions under review. Indeed, in its prior opinion in this case, the Sixth Circuit expressly *rejected* the argument that the health planning statutes impliedly repealed the antitrust laws. 666 F.2d at 1034. This became, and remains, the law of the case.

The District Court simply held that communications between the alleged conspirators must be evaluated with reference to the characteristics of the industry in which they took place. In so holding, the District Court properly applied this Court's analysis in *Monsanto* and *Matsushita*. Its holding is entirely consistent with those in other Circuits.[9] To consider the existence of the regulatory environment, as the District Court did, no more constitutes "implied repeal" than did the analysis in those decisions. Had the District Court ignored the regulatory environment, it would have applied a *lower*, not a higher, standard for proof of an antitrust conspiracy from ambiguous evidence than has been applied in cases involving unregulated industries.

3. Both The District Court And The Court Of Appeals Properly Applied The *Noerr-Pennington* Doctrine

The true thrust of Petitioners' *Noerr-Pennington*[10] argument is revealed in the final clause of their statement of the second question presented. Petitioners continue to argue that the evidence before the District Court was sufficient to create a genuine issue regarding "capture" of the regulatory agen-

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[9] See, *e.g.*, *Cooper* v. *Forsyth County Hospital Authority*, 789 F.2d 278 (4th Cir.), *cert. denied*, 479 U.S. 972 (1986) (communications between the hospital, physicians and physician groups were insufficient to permit the jury to infer the existence of the alleged conspiracy to deny hospital staff privileges to podiatrists); *Kreuzer* v. *American Academy of Periodontology*, 735 F.2d 1479, 1488 (D.C. Cir. 1984) ("this court will not infer a conspiracy to violate the antitrust laws based on a showing of regular contact between two independent professional associations on general matters of mutual interest and concern"); *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 624 F.2d 476, 483 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (communications between groups of health care providers and health insurers do not establish a conspiracy to disadvantage competing provider groups).

[10] *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

cies.[11] The District Court and Sixth Circuit after careful review of the complete record disagreed. Petitioners now seek to have this Court conduct yet a third review of that record.

As below, Petitioners claim that three alleged acts of Respondents constituted "sham" or "co-conspirator" activity. First, Petitioners contend that the MDPH Officials conspired with Respondents to delay or prevent Huron Valley from entering the market. Petition at 19. This argument might be of consequence if it had any factual basis. The District Court, however, reviewed the extensive record in this action and determined that Petitioners "failed to produce *any evidence* creating a material issue of fact as to whether MDPH officials conspired with any of the defendants." 650 F. Supp. at 1342; Petition at 35a (emphasis added). The Sixth Circuit reviewed that record and affirmed the District Court. 849 F.2d at 263; Petition at 2a. As the District Court concluded, there is absolutely nothing in the contacts described by Petitioners which goes beyond the communication of Respondents' views to the planning agencies. This is precisely the type of First Amendment activity protected by the *Noerr-Pennington* doctrine.[12]

Second, Petitioners argue that the preference of MDPH and CHPC-SEM to work with existing hospitals denied Petitioners meaningful access to the regulatory process. The District Court recognized that conduct which results in the denial of meaningful access does not enjoy *Noerr-Pennington* protection. It ruled, however, that the evidence presented was insuf-

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[11] Although Petitioners raised the District Court's disposition of the *Noerr-Pennington* issue in the Sixth Circuit and again in their Petition, the District Court noted that a "decision under *Noerr-Pennington* is not necessary to a disposition of the antitrust claim." 650 F. Supp. at 1339; Petition at 28a. Respondents agree.

[12] In *Boone* v. *Redevelopment Agency of San Jose*, 841 F.2d 886, 894-95 (9th Cir. 1988) the Ninth Circuit noted that petitioning of government contemplated by the *Noerr-Pennington* doctrine often requires "cultivating close ties" with government officials and "*ex parte* deliberations between decision-makers and advocates of a particular view."

ficient to create a genuine issue whether the preference resulted from a conspiracy with Respondents:

> This Court cannot agree with the plaintiff that the preference for existing facilities denied plaintiff meaningful access to the regulatory process . . . . While the preference obviously operated to plaintiff's detriment, there is *no evidence* it was the result of activity by the moving defendants that barred plaintiff's access by corrupting the governmental processes.

650 F. Supp. at 1342-43; Petition at 35a (emphasis added). Petitioners, moreover, have never claimed and have presented no evidence even suggesting that the *second* stage of the state administrative procedure, before MSHFC, was subverted by any improper action of Respondents. Petitioners had complete access to MSHFC and MSHFC made the final administrative decision on Petitioners' CON application. Nor have Petitioners ever claimed or presented any evidence that the state court processes were subverted.[13]

Third, Petitioners maintain that the Respondents' requests to HHS to reconsider Petitioners' Section 1122 approval, which resulted in HHS reversing and vacating that approval, is evidence of "sham" activity. Respondents, however, had an express statutory right to request the Secretary to reconsider Petitioners' Section 1122 application[14] and had a legitimate basis for doing so.

The basis for Respondents' petitions to HHS was that no agency charged with determining the need for health facilities had determined that there was a need for Huron Valley Hospital. The Michigan courts ordered the CON issued not because of need, but because of procedural errors by the administrative

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[13]Indeed, Petitioners' access to the courts has few parallels in American jurisprudence. See Appendix B hereto.

[14]Section 1122(f) provides that "[a]ny person dissatisfied with a determination by the Secretary under this Section [1122] may within six months following notification of such determination request the Secretary to reconsider such determination." 42 U.S.C. § 1320a-1(f).

agencies. MDPH recommended Section 1122 approval not because of a determination of need, but as part of a settlement which dropped MDPH as a defendant from this action. The lack of any determination of need was an issue of "genuine substance" to Respondents. It is not surprising that when the peculiar circumstances under which Petitioners obtained their Section 1122 approval were brought to its attention, HHS withdrew the Section 1122 approval.

Contrary to Petitioners' contention, the District Court was correct in finding that Respondents' *initial success at HHS* created a presumption that Respondents' petitioning was in good faith, and that Petitioners failed to rebut this presumption. 650 F. Supp. at 1342; Petition at 34a. As the District Court and the Sixth Circuit understood, *Noerr-Pennington* protection is not lost because the governmental action sought is *ultimately* found to have been unauthorized, illegal or even unconstitutional.[15] In fact the very District Court which issued

[15]The opinions of the District Court and the Sixth Circuit are consistent with decisions in many other Circuits. See *Greenwood Utilities Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1500 (5th Cir. 1985) ("an ultimate determination that agency action sought was unauthorized by statute should not remove protection for petitioning conduct directed at the agency to obtain that action"; "[a] contrary rule would not only chill petitioning activity but also might unduly interfere with the proper functioning of government action outside the proper channels for judicial review of such actions"); *Scott v. City of Sioux City*, 736 F.2d 1207 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985) (affirming award of summary judgment since neither alleged bias on the part of the City's decision-makers nor their departure from procedural requirements deprived those petitioning the City of their First Amendment protection); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Bd. of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) ("[w]e know of no case that holds that joint action which succeeds in persuading a public body to make an erroneous decision can give rise to a cause of action under the Sherman Act").

Petitioners improperly cite *Potters Medical Center v. City Hospital Association*, 800 F.2d 568, 578 (6th Cir. 1986); *Federal Prescription Service, Inc. v. American Pharmaceutical Association*, 663 F.2d 253, 265 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982); and *Neumann v. Reinforced Earth Co.*, 594 F. Supp. 139 (D.D.C. 1984), *aff'd*, 786 F.2d 424 (D.C. Cir.), *cert. denied*, 479 U.S. 851 (1986), for the proposition that a party's ultimate

(Continued)

the writ of mandamus to HHS also determined that Respondents' activity was protected:

> However, the Court finds that after extensive discovery plaintiff has failed to come forward with any evidence that would create a material issue of fact as to the bona fides of defendants' action.

650 F. Supp. at 1342; Petition at 34a.

Finally, in an attempt to cloak their Petition with an appearance of jurisprudential significance, Petitioners cite this Court's recent decision in *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988). *Allied Tube* is irrelevant to any issue involved in this action.

In *Allied Tube*, the plaintiff alleged that the defendants violated Section 1 by causing a private association to adopt a standard banning the use of plastic conduit. Defendants argued that because government agencies often incorporated the association's private standards into official building codes, defendants' conduct was protected by the *Noerr-Pennington* doctrine. This Court disagreed, noting that by adopting private standards, members of the association agreed among themselves "not to manufacture, distribute, or purchase certain types of products." The Court concluded that a "party enjoys no *Noerr* immunity from the effect the [private] standard has *of its own force* in the marketplace." 100 L.Ed.2d at 505, 511 (emphasis added).[16]

(Continued)

failure to prevail is evidence of "sham" activity. These cases, to the contrary, all stand for the proposition that if a party *prevails* in its position, this reinforces the conclusion that the party did *not* engage in "sham" activity. *Clipper Express* v. *Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240, (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983), is also inapposite. In *Clipper*, the defendants admitted that their protests were filed automatically and without regard to the merits. The court determined that such an admission, along with the fact that the defendants lost all their administrative protests, established a sufficient showing of baselessness for plaintiff to avoid summary judgment. 690 F.2d at 1257.

[16]The Court noted that "no damages were imposed for the incorporation of that Code by any government." 100 L.Ed.2d at 505.

In the present case, as the District Court determined, no agreement between the Respondents had any impact "of its own force" on Petitioners. Respondents did not have the ability to deny Petitioners their CON or Section 1122 approval. Respondents could only attempt to dissuade the governmental agencies, MDPH, MSHFC, and HHS, from doing so. 650 F. Supp. at 1328, 1342; Petition at 7a, 34a. The Respondents' alleged actions can aptly be characterized as political activity and, thus, squarely within the *Noerr-Pennington* protection as interpreted in *Allied Tube*.

The long and complex history of this case through the administrative process, the state courts and the federal courts demonstrates that Petitioners had free and unlimited access to the machinery of the agencies and the courts and that Petitioners have availed themselves of that machinery to the expense and frustration of Respondents. The District Court's *Noerr-Pennington* analysis, which the Sixth Circuit affirmed, conforms to this Court's decisions as uniformly applied by the Circuit Courts.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Grady Avant, Jr.
(Counsel of Record)
Jerry L. Johnson
DICKINSON, WRIGHT, MOON, VAN DUSEN & FREEMAN
800 First National Building
Detroit, Michigan 48226
(313) 223-3500
Attorneys for Greater Detroit Area Health Council, Inc. and North Oakland County Planning Steering Committee

Robert A. Maxwell
(Counsel of Record)
David A. Hardesty
MAXWELL, SMITH, HANSON & MULVOY
300 E. Long Lake Rd., Ste. 300
Bloomfield Hills, MI 48013
(313) 647-1500
Attorney for Sisters of Mercy Health Corporation

Anthony A. Derezinski
MERCY HEALTH SERVICES
28700 Eleven Mile Road
Farmington Hills, MI 48081
(313) 478-6313
Of Counsel for Sisters of Mercy Health Corporation

Larry J. Saylor
(Counsel of Record)
MILLER, CANFIELD, PADDOCK AND STONE
2500 Comerica Building
Detroit, Michigan 48226
(313) 963-6420
Attorneys for City of Pontiac and City of Pontiac Hospital Building Authority

Timothy M. Guerriero
(Counsel of Record)
Bruce G. Davis
RILEY AND ROUMELL
7th Floor Ford Building
Detroit, Michigan 48226
(313) 962-8255
Attorneys for Comprehensive Health Planning Council of Southeastern Michigan, Terence E. Carroll and Paul Massaron

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APPENDIX A

I. STATEMENT OF ISSUES

A. Did the district court err in determining that summary judgment was appropriate when there were genuine issues of material fact concerning the existence of a conspiracy in violation of Section 1 of the Sherman Act and Section 1983 of U.S.C. Title 42?

B. Did the district court err in determining that private parties were entitled to immunity where their conspiratorial acts were outside both federal and state health care regulatory structures?

C. Did the district court err in determining that the sham and co-conspirator exceptions did not preclude application of the *Noerr-Pennington* doctrine?

Brief of Plaintiffs-Appellants Huron Valley Hospital, Inc. and Martin L. Trepel, D.O., 6th Cir. Nos. 87-1265, 87-1303, at 1.

APPENDIX B

In addition to the present lawsuit, Petitioners have filed at least seven other lawsuits arising out of their attempts to build the hospital. First, Petitioners unsuccessfully sued to prevent MDPH from issuing a CON to Pontiac General Hospital. *Huron Valley Hospital, Inc.* v. *Michigan Department of Public Health*, 92 Mich. App. 175, 285 N.W.2d 758 (1979). Next, Petitioners successfully appealed to the Michigan courts from MSHFC's denial of their CON application. *Huron Valley Hospital, Inc.* v. *Michigan State Health Facilities Commission*, 110 Mich. App. 236, 312 N.W.2d 422 (1981). Petitioners then filed an original action in the Michigan Court of Appeals, seeking a writ of mandamus compelling issuance of a CON for an addition to their as yet unbuilt hospital. *Huron Valley Hospital, Inc.* v. *Walker*, Michigan Court of Appeals No. 6620 (unpublished order dated April 19, 1983 dismissing complaint). In *Huron Valley Hospital, Inc.* v. *Gloria Smith*, Oakland County Circuit Court No. 84-2827590-AW and Michigan Court of Appeals No. 85-785 (dismissed March 1986), Petitioners unsuccessfully sought judicial intervention in the administrative proceeding concerning their second CON application.

In *Trepel* v. *Pontiac Osteopathic Hospital*, 599 F. Supp. 1484 (E.D. Mich. 1984), *aff'd*, 780 F.2d 1023 (6th Cir. 1985), the financially interested Petitioner alleged that the hospital Respondents had conspired to cause Pontiac Osteopathic Hospital (POH) to refuse to renew his radiology contract in order to cut off his source of funds for promoting the new hospital. The District Court granted summary judgment to defendants, and the Sixth Circuit affirmed. In *Trepel* v. *Pontiac Osteopathic Hospital*, 135 Mich. App. 350, 354 N.W.2d 336 (1984), *leave to appeal denied, on remand*, Oakland County Circuit Court No. 79-198827-CZ (unpublished order dated March 30, 1987 dismissing complaint and counterclaim), the same Petitioner pursued his contract nonrenewal claim in state court, and POH countersued for tortious interference with its CON

application. Finally, in *Trepel* v. *Huron Valley Hospital*, Oakland County Circuit Court No. 85-303078-CZ (dismissed May 6, 1987), Petitioners sued one another over an alleged agreement to name the new hospital after the individual Petitioner and over development of a parcel of land owned by the individual Petitioner adjacent to the hospital.